UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

PRIME AID PHARMACY CORP.,	)	
	)	
	)	
Plaintiff,	)	
	)	Case No.: 4:16-cv-01237-CEJ
v.	)	
	)	
EXPRESS SCRIPTS, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

COMES NOW Defendant Express Scripts, Inc. ("Express Scripts") and, in support of its Motion to Dismiss, states as follows:

INTRODUCTION

Plaintiff Prime Aid Pharmacy Corp. ("Prime Aid") fails to adequately plead a single cause of action against Express Scripts. Prime Aid's claims arise from the parties' express contractual relationship and Express Scripts' termination of that relationship in August 2014, over two years ago.

Despite the fact that Express Scripts terminated the parties' agreement due to Prime Aid's multiple breaches, Prime Aid now brings a breach of contract claim (as well as a series of closely related claims) against Express Scripts. However, Prime Aid fails to allege that it performed its own contractual obligations. This is a required and fundamental element of a breach of contract claim under Missouri law, and Prime Aid's failure to allege this, in even the most conclusory fashion, is telling. Prime Aid's breach of contract claim (Count II) therefore fails.

Prime Aid's claims for unjust enrichment and promissory estoppel (Counts V and VI) also fail. These are ***quasi*** or ***implied*** contractual claims that are available only in the absence of an express contract between the parties. Yet Prime Aid alleges that the parties had an express contract that governs the same subject matter of this dispute. Indeed, Prime Aid attaches that express contract to its Complaint. Given the undisputed existence of this express contract, Prime Aid's claims for unjust enrichment and promissory estoppel should be dismissed.

The remainder of Prime Aid's Complaint asserts a hodgepodge of claims against Express Scripts, each of which fails to show that Prime Aid is entitled to any relief. Prime Aid has a vague claim for the breach of the implied covenant of good faith and fair dealing (Count III) that appears to be based on some unidentified "New Jersey law", yet no New Jersey law actually supports this claim. Prime Aid's claim for fraudulent misrepresentation (Count I) fails to allege specific facts showing either how it relied on Express Scripts' alleged misrepresentation, or that Express Scripts somehow knew that its representation to Prime Aid was false. Prime Aid's claim for violation of the Missouri Prompt Pay Act (Count IV) does not allege several of the statutorily required elements, such as whether Prime Aid submitted the claims electronically, the date of each claim at issue, and whether Prime Aid made proper demands. And, finally, Prime Aid's claim for an equitable accounting (Count VII) does not (and could not) allege facts demonstrating that the parties had a fiduciary relationship.

In short, Prime Aid's Complaint fails to state any claims against Express Scripts. The Court should dismiss the Complaint.

FACTUAL BACKGROUND

Express Scripts is a pharmacy benefit manager. Compl. ¶¶ 4, 14. Express Scripts works with its clients, health plans sponsored by a variety of employers and other third-party payors, to ensure that plan members have safe, consistent, and affordable access to prescription medications. One of the ways Express Scripts does that is to maintain a network of pharmacies that meet Express Scripts' standards and requirements, as set forth in a contract between Express Scripts and the network pharmacy.

Prime Aid was a pharmacy that participated in Express Scripts' pharmacy provider network pursuant to the terms of an express contract between the parties. *Id*. ¶¶ 24-25. Based on Prime Aid's breaches, Express Scripts terminated the contract with Prime Aid – and Prime Aid ceased its participation in Express Scripts' provider network – in August 2014. *Id*. ¶¶ 32-34 and Ex. D. Express Scripts determined that Prime Aid had breached the contract repeatedly by failing to timely reverse prescription drug claims Prime Aid submitted to Express Scripts where patients did not actually pick up those prescriptions within ten days after submission of the claim by Prime Aid. *Id*. ¶¶ 33, 40. Express Scripts also learned that Prime Aid failed to disclose to Express Scripts that the New Jersey State Board of Pharmacy had preliminarily found that Prime Aid had violated a series of regulatory provisions and that Prime Aid had agreed to pay a $750 penalty to resolve the matter. *Id*. ¶¶ 33, 46-47 and Ex. H.

STANDARD OF REVIEW

Dismissal under Federal Civil Procedure Rule 12(b)(6) "is proper where the plaintiffs' complaint fails to state a claim upon which relief can be granted." *Cook v. ACS State & Local Solutions, Inc.*, 663 F.3d 989, 992 (8th Cir. 2011). A plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not shown — that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). (quotations omitted). In other words, if a claim is merely conceivable or possible, but not plausible, the complaint must be dismissed. *See id.*; *see also Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008)

(“Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate.”). A plaintiff’s obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions.” *Twombly*, 550 U.S. at 555. “[U]nadorned, the-defendant-unlawfully-harmed-me accusation[s] … devoid of further factual enhancement” are not sufficient. *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. Prime Aid’s Breach of Contract Claim (Count II) Fails Because Prime Aid Has Not Alleged That It Performed Its Own Contractual Obligations.

Under Missouri law, “[a] breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that the plaintiff performed or tendered performance under the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff.” *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. 2010).

Prime Aid does not allege, even in conclusory fashion, that it performed its obligations under the contract. To the contrary, Prime Aid virtually concedes that it failed to perform its obligation to timely reverse prescription claims that are not picked up by a patient within ten days after Prime Aid submitted the claim to Express Scripts. *See* Compl. ¶ 40 (alleging contractual requirement that “any prescription not picked up by an insured within ten (10) days of submission of the claim by Prime Aid must be reversed within three (3) days after the expiration of the ten-day period.”). While Prime Aid alleges that Express Scripts raised this deficiency as a basis for termination, *see* Compl. ¶¶ 32-33 and Ex. D, Prime Aid never claims that Express Scripts was wrong in asserting that Prime Aid had failed to timely reverse claims as required by the parties’ contract.[1]

[1] Prime Aid simply tries to minimize the importance of this contractual requirement, but the failure to timely reverse claims is an indicator of potential fraud and abuse by a pharmacy. *See*

Because Prime Aid has not alleged its own performance under the contract, Prime Aid has not stated a claim for breach of contract. *Berringer v. JPMorgan Chase Bank, N.A.*, 16 F. Supp. 3d 1044, 1047-48 (E.D. Mo. 2014) (granting motion to dismiss breach of contract claim, among other things, the complaint contained "no allegations concerning Plaintiff's performance or tender of performance"); *see also Women's Care Specialists, LLC v. Troupin*, 408 S.W.3d 310, 317 n. 5 (Mo. Ct. App. 2013) (holding that plaintiff's breach of contract claim failed because plaintiff "cannot establish a required element in a breach of contract action—that claimant performed pursuant to the contract."). The Court should dismiss Count II.

II. Prime Aid's Quasi or Implied Contract Claims (Counts V and VI) Should Be Dismissed Because There Is An Express Contract Between the Parties That Covers the Subject Matter of the Dispute.

In Missouri, "[i]t is a well-settled principle of law that implied contract claims arise only where there is no express contract." *Lowe v. Hill*, 430 S.W.3d 346, 349 (Mo. Ct. App. 2014). "Accordingly, a plaintiff cannot recover under an equitable theory when she has entered into an express contract for the very subject matter for which she seeks to recover." *Id*. Yet this is precisely what Prime Aid seeks to do here. Prime Aid claims that Express Scripts breached an express contract between the parties, *see* Compl. Count II, "Breach of Contract," while also asserting that Prime Aid is entitled to recover based on a variety of quasi or implied contractual claims like Unjust Enrichment (Count V) and Promissory Estoppel (Count VI). Because there is

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Compl. Ex. D (describing how several of Prime Aid's patients had reported to Express Scripts that they had never picked up certain prescriptions drugs from Prime Aid, even though Prime Aid had submitted claims for these prescriptions to Express Scripts and did not reverse the claims until weeks, or even months, later). Moreover, while Prime Aid claims Express Scripts only found that Prime Aid violated this requirement seven times, Comp. ¶ 38, Express Scripts' termination letter identified seven such instances as a sampling of Prime Aid's egregious conduct.

no doubt that an express contract governs the subject matter of Prime Aid claims, the Court should dismiss those claims based on implied or quasi contractual theories (Counts V and VI).

A. Prime Aid's Unjust Enrichment Claim Fails Because There Is An Express Contract Between the Parties That Covers the Subject of This Claim and That Prime Aid Attached to the Complaint.

To succeed on an unjust enrichment claim a plaintiff must show: (1) that plaintiff conferred a benefit on defendant; and (2) defendant's retention of that benefit without paying reasonable value would be unjust. *Earley v. Wachovia Bank, N.A.*, 361 Fed. App'x 699, 700 (8th Cir. 2010) (citing *ACLU/E. Mo. Fund v. Miller*, 803 S.W.2d 592, 595 (Mo. 1991). In addition, however, "Missouri law does not permit recovery … [for] unjust enrichment when 'the plaintiff's relationship with the defendant is governed by an existing contract.'" *32nd St. Surgery Ctr., LLC v. Right Choice Managed Care*, 820 F.3d 950, 957 (8th Cir. 2016) (quoting *Burrus v. HBE Corp.*, 211 S.W.3d 613, 619 (Mo. Ct. App. 2006)); *R&R Land Dev., LLC v. Am. Freightways, Inc.*, 389 S.W.3d 234, 243 (Mo. Ct. App. 2012) ("[I]f the plaintiff has entered into an express contract for the very subject matter for which he seeks recovery, unjust enrichment does not apply, for the plaintiff's rights are limited to the express terms of the contract."). "In such cases, 'the plaintiff's sole theory of recovery must lie on the contract.'" *32nd St. Surgery Ctr.*, 820 F.3d at 957 (quoting *Burrus*, 211 S.W.3d at 619).

Here, there was undoubtedly an express contract between the parties. *See, e.g.*, Compl. ¶ 25 ("On July 25, 2011, Express Scripts and Prime Aid executed the Provider Agreement.); *id.* ¶ 79 ("Express Scripts and Prime Aid entered into the Provider Agreement, according to which Prime Aid would provide specialty medications to Express Scripts' insureds."). Indeed, Prime Aid attached that contract to the Complaint. *Id.* ¶¶ 7, 25, and Ex. A. Prime Aid says it provided "specialty medications to Express Scripts' insureds" pursuant to that contract, and that Express

Scripts breached that contract "by failing to remit to Prime Aid amounts due and owing to Prime Aid under the Provider Agreement." *Id*. ¶¶ 79, 82 (making these allegations in the context of Count II for "Breach of Contract"). In spite of this, Prime Aid also seeks to recover, based on an unjust enrichment claim, money that Express Scripts has allegedly failed to pay for medications that Plaintiff provided pursuant to that contract. *Id*. ¶¶ 105-107. Such a claim fails because Prime Aid's "sole theory of recovery must lie on the contract" that undeniably exists here. *32nd St. Surgery Ctr.*, 820 F.3d at 957, 958 (holding that medical provider's unjust enrichment claim against various insurers, which asserted that defendants failed to reimburse the provider for services performed at a "reasonable rate," failed because the parties had express contracts that governed reimbursement rates); *Lowe v. Hill*, 430 S.W.3d 346, 349-50 (Mo. Ct. App. 2014) (holding that unjust enrichment claim failed where the parties had an express contract and recognizing that "[i]t is a well-settled principle of law that implied contract claims arise only where there is no express contract."). Thus, the Court should dismiss Prime Aid's claim for unjust enrichment (Count V).

B. Prime Aid's Promissory Estoppel Claim Also Fails Because There Is an Express Contract Between the Parties.

Prime Aid's promissory estoppel claim (Count VI) similarly fails. Promissory estoppel generally requires a plaintiff to demonstrate: (1) a promise; (2) the plaintiff detrimentally relied on the promise; (3) the defendant could reasonably foresee the precise action the plaintiff took in reliance; and (4) injustice can only be avoided by the enforcement of the promise. *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 477 (8th Cir. 2006). However, like unjust enrichment, "promissory estoppel serves as an equitable remedy where an express contract does not exist …." *Chesus v. Watts*, 967 S.W.2d 97, 106 (Mo. Ct. App. 1998). In addition, as an equitable remedy, promissory estoppel is inappropriate where the plaintiff seeks money damages. *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 389 (Mo. Ct. App. 2010). Finally, the "doctrine of promissory estoppel is to be applied with caution, sparingly and only in extreme cases to avoid unjust results." *City of St. Joseph, Mo. v. Sw. Bell Tel.*, 439 F.3d 468, 477 (8th Cir. 2006)).

Prime Aid's promissory estoppel claim is only a rehash of its claim for breach of the express contract. Prime Aid claims that Express Scripts breached the parties' express contract by "failing to remit to Prime Aid amounts due and owing to Prime Aid under the Provider Agreement" for medications dispensed by Prime Aid to Express Scripts' insureds. Compl. ¶¶ 79, 82; *see also* Compl. Ex. A, the parties' Provider Agreement, § 3.1.a. ("**Payment for Covered Medications**. For services performed in accordance with the terms and conditions of this Agreement, [Express Scripts] shall pay [Prime Aid] the rates as set forth in the applicable" rate schedule). Prime Aid's promissory estoppel claim likewise asserts that Express Scripts broke its promise to pay Prime Aid for medications dispensed to Express Scripts' members. Compl. ¶¶ 112, 115 (alleging, in context of promissory estoppel claim, that Express Scripts "promised to provide payment for specialty drug prescriptions filled by Prime Aid for Express Scripts' insureds" and that Express Scripts failed to do so). Given the existence of the express contract (and Prime Aid's claim based on that contract), the promissory estoppel claim fails.

Moreover, the promissory estoppel claims seeks money damages, namely the alleged "hundreds of thousands of dollars of damages for" the medications provided by Prime Aid to Express Scripts' members. Compl. ¶ 116. This too means that the equitable claim for promissory estoppel fails. *Birkenmeier*, 312 S.W.3d at 389 (holding that "application of promissory estoppel was inappropriate" where plaintiff sought money damages)

III. Prime Aid's Breach of Good Faith and Fair Dealing Claim (Count III) Fails Because Prime Aids Vague Reference to "New Jersey Law" Does Not Demonstrate That Prime Aid Had Any Right to Ninety-Days Notice and a Hearing Prior to Termination.

While "Missouri law implies a covenant of good faith and fair dealing in every contract," this "implied covenant … will not be imposed where the parties expressly address the matter in their contract." *Berringer*, 16 F. Supp. 3d at 1048 (internal quotations and citations omitted). Here, Prime Aid's claim for breach of the covenant of good faith and fair dealing is confusing and unclear, but, at best, it rests on nothing more than boilerplate allegations that do not plausibly state an actionable claim.

Prime Aid's claim appears to rely entirely on the notion that "New Jersey law" somehow required Express Scripts to give Prime Aid "90 days' notice and opportunity for a hearing" when there is some question "concerning the execution of [the parties'] contract" and that Express Scripts failed to provide this supposedly required notice and hearing. Compl. ¶¶ 89, 90. Prime Aid does not specifically identify what "New Jersey law" it is referring to. The only specific reference or cite to some New Jersey law anywhere in the Complaint is in Paragraph 39, which cites "N.J.A.C § 11.25-15.2" for the proposition that Express Scripts somehow owed Prime Aid a written explanation of the termination of the parties' contract.

"N.J.A.C. § 11.25-15.2" does not exist. Perhaps Prime Aid intended to refer to N.J.A.C § 11.24-15.2, but that section only applies to contracts between a healthcare provider and an HMO, or "Health maintenance organization." *See* N.J.A.C. § 11.24-15.2; 11.24-1.2 (defining HMO as a "Health maintenance organization."). As Prime Aid alleges, however, "Express Scripts is a

Pharmacy Benefit Manager." Compl. ¶ 4. There is no allegation—nor could there be—that Express Scripts is an HMO.[2]

Prime Aid also vaguely alleges in Paragraph 35 that the parties' contract "required ninety (90) days notice of a hearing pursuant to Section 4.2.c. of the Provider Agreement and Appendix B of the Network Provider Manual." Compl. ¶ 35. Section 4.2(c) and Appendix B of the Provider Manual require no such thing; indeed, those contractual provisions say nothing at all about 90 days notice or a hearing. Compl. Ex. A, Provider Agreement Section 4.2.c; Compl. Ex. B, Provider Manual Appendix B. To the contrary, Section 4.2.c. of the Provider Agreement and the relevant portion of Appendix B to the Provider Manual are titled "**Immediate Termination**" and address the various circumstances in which Express Scripts could end the agreement with Prime Aid at once and without regard to some supposed notice period or the need for any hearing. Compl. Ex. A, Provider Agreement Section 4.2.c.; Compl. Ex. B, Provider Manual Appendix B at p. 259 ("Immediate Termination" section).

It is unclear what exactly Prime Aid's good faith and fair dealing claim is based on. The Complaint does not identify the "New Jersey law" that supposedly required Express Scripts to give Prime Aid notice and an opportunity for a hearing. The only "New Jersey law" that Prime Aid may have intended to cite in the Complaint plainly does not apply because Express Scripts is not an HMO, and Prime Aid does not allege otherwise. Moreover, the contractual provisions cited by Prime Aid make no reference to any such notice and hearing and actually demonstrate that Express Scripts could terminate Prime Aid immediately in light of its admitted contractual

[2] Moreover, N.J.A.C. § 11.24-15.2's notice provision applicable to "provider contracts with the HMO" contains an express exception where the termination "is based on … breach of contract by the provider …." N.J.A.C. § 11.24-15.2(b)(1)(i). Accordingly, this provision is inapplicable for the additional reason that Express Scripts' termination of Prime Aid was based on Prime Aid's breaches of that contract.

breaches. Given these deficiencies, the Court should dismiss Count III. *See Berringer*, 16 F. Supp. 3d at 1048-49 (dismissing claim for breach of covenant of good faith and fair where, *inter alia*, the parties' contract addressed the matter raised by the complaint and gave defendant the contractual right to act as it did); *see also Countrywide Servs. Corp. v. SIA Ins. Co.*, 235 F.3d 390, 393 (8th Cir. 2000) (affirming dismissal of claim for breach of covenant of good faith and fair dealing because party could have no legitimate expectations beyond the bounds of the contract terms).

IV. Prime Aid's Fraudulent Misrepresentation Claim (Count I) Should Be Dismissed Because Prime Aid Fails to Plead Several Elements of This Claim with the Required Specificity.

Federal Rule of Civil Procedure 9(b) requires a party asserting a fraud claim to plead with particularity the circumstances constituting fraud or mistake. Fed. R. Civ. P. 9(b). The Eighth Circuit has consistently held that "'circumstances' include … what was obtained or given up" as a result of the alleged misrepresentation. *Bennett v. Berg*, 685 F.2d 1053, 1062 (8th Cir. 1982) (emphasis added).

Here, Prime Aid has pleaded no specific facts showing how it relied on the alleged misrepresentation—*i.e.*, what it obtained or gave up in reliance on Express Scripts' purported misrepresentation. Put another way, Prime Aid fails to allege with particularity what it did in response to the alleged misrepresentation that it otherwise would not have done. Absent such specific allegations, Prime Aid's fraud claim fails to meet the heightened requirement of Rule 9(b). *See In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 321 (8th Cir. 1997) (affirming grant of motion to dismiss fraud claims because plaintiffs failed to adequately plead reliance and noting that reliance element "requires plaintiffs to prove that alleged misrepresentations induced them to do something different from what they would otherwise have done ….."); *Stein v. Novus*

Equities Co., 284 S.W.3d 597, 603 (Mo. Ct. App. 2009) (affirming grant of motion to dismiss claim for fraudulent misrepresentation where plaintiffs failed to plead facts showing that they "took or refrained from taking any action in reliance upon the misrepresentations ….").

Prime Aid also fails to allege facts demonstrating that its reliance was justified or reasonable. Prime Aid's allegation is that Express Scripts said it did not owe Prime Aid any money for prescription drug claims that Prime Aid had submitted, and Prime Aid did nothing to confirm whether this was true. As a matter of law, this is not reasonable reliance. *See Sherwin-Williams Co. v. Novak's Collision Ctr., Inc.*, 2013 WL 5500107, at *4 (E.D. Mo. Oct. 3, 2013) (granting motion to dismiss fraud claim because plaintiff failed to allege justifiable reliance on defendant's representation in the context of an arms-length contractual relationship).

Moreover, while Prime Aid alleges in boilerplate fashion that Express Scripts "had knowledge, or was reckless indifferent to, the falsity of [its] representation as to whether monies were being withheld," Compl. ¶ 71, it makes no specific factual allegations which would support the conclusion that Express Scripts' representation was made with knowledge of its falsity. Absent such allegations, Prime Aid's claim for fraudulent misrepresentation should also be dismissed on this basis. *See Laidlaw Waste Sys., Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 635 (E.D. Mo. 1996) (granting motion to dismiss fraud claim where plaintiffs alleged that defendants "made the representations to plaintiffs in reckless disregard for their truth or falsity," but allegations were "lacking specific supporting facts from which it can be inferred that defendants knew their representations were false when made, or made the representations recklessly, without knowing if they were true or false.").

V. Prime Aid's Claim for Violation of the Missouri Prompt Pay Act (Count IV) Should Be Dismissed.

Missouri Prompt Pay Act ("MPPA") claims relate to the reimbursement of healthcare claims and denial notification by a health carrier for refusal to reimburse a healthcare claim. Mo. Stat. § 376.383. The statute requires a party to plead very specific items in order to survive a motion to dismiss. *See Midwest Special Surgery, P.C. v. Anthem Ins. Companies*, 2010 WL 716105, at *5 (E.D. Mo. Feb. 24, 2010) (granting Defendants' motion to dismiss for failing to allege an MPPA claim with sufficient factual support to be plausible on its face). In order to pursue a claim under MPPA, a plaintiff's complaint is required to plead each of the following:

(1) whether Plaintiff submitted the claims electronically;

(2) the date of each claim at issue;

(3) whether additional information was requested for Plaintiff to provide;

(4) the grounds for denial;

(5) whether those grounds were reasonable;

(6) whether Plaintiff made proper demands; and

(7) which allowable claims were not paid within MPPA deadlines.

Id. (citing Mo. Stat. § 376.383).

Here, Prime Aid's Complaint fails to allege anything about the claims it believes were not paid in accordance with the MPPA, including: (1) whether Prime Aid submitted the claims electronically, (2) the date of each claim at issue; (3) whether Express Scripts requested that Prime Aid provide additional information related to those claims; (4) the grounds for denial; and (5) whether Prime Aid made proper demands. Prime Aid has not pled the required underlying facts that would support a claim that Express Scripts violated the MPPA. Rather, Prime Aid simply regurgitates some of the statutory provisions of MPPA along with legal conclusions that

Express Scripts did not properly deny, or provide proper notification regarding, some unidentified claims. *See* Compl. ¶¶ 93-101. Legal conclusions devoid of factual allegations required by the statute cannot state a claim for relief under the MPPA. *See Midwest Special Surgery, P.C.*, 2010 WL 716105 at *5 (finding that Plaintiffs failed to properly plead a claim under MPPA under the *Twombly* requirements because the complaint only contained allegations that Plaintiffs made repeated demands for payment after Defendants failed to pay or paid below the Usual and Customary Rate and failed to pay claims for facility fees).

VI. Prime Aid's Equitable Accounting Claim (Count VII) Fails Because Prime Aid Fails to Allege That a Fiduciary Relationship Exists.

For its equitable accounting claim under Missouri law, Prime Aid must show: (1) a need for discovery of the information relevant to the property, (2) that the accounts are complicated, (3) that a fiduciary relationship exists, and (4) that plaintiff does not have an adequate remedy at law. *In re Vantage Investments, Inc.*, 385 B.R. 670, 706 (Bankr. W.D. Mo. 2008). To establish the existence of a fiduciary relationship, Prime Aid must demonstrate: (1) as between the parties, one is subservient to the dominant mind and will of the other as a result of age, state of health, illiteracy, mental disability, or ignorance; (2) things of value such as land, monies, a business, or other things of value which are the property of the subservient person are possessed or managed by the dominant party; (3) a surrender of independence by the subservient party to the dominant party; (4) an automatic or habitual manipulation of the actions of the subservient party by the dominant party; and (5) that the subservient party places a trust and confidence in the dominant party. *C & J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F. Supp. 867, 874–75 (E.D. Mo. 1986) (citing *Chmieleski v. City Products Corp.*, 660 S.W.2d 275, 294 (Mo. App. 1983)).

Here, the equitable accounting claim fails because Prime Aid alleged no facts showing that Express Scripts is a fiduciary of Prime Aid. Prime Aid alleges no specific facts showing, for example, that Prime Aid is subservient to Express Scripts, that Prime Aid surrendered its independence to Express Scripts, or that Prime Aid placed a special confidence in Express Scripts. Indeed, Prime Aid concedes that the parties' contract "stipulates that the parties are independent contractors …." Compl. ¶ 120. Prime Aid tries to get around this fact by baldly alleging that the "complex nature of the Provider Agreement" somehow created a fiduciary relationship. *Id*. This falls well short of pleading the required fiduciary relationship, however, as the "mere existence of a business relationship, without more, does not give rise to a fiduciary relationship." *C & J Delivery, Inc. v. Emery Air Freight Corp.*, 647 F. Supp. 867, 875 (E.D. Mo. 1986); *see also Smith v. Goodyear Tire & Rubber Co., Inc.*, 856 F. Supp. 1347, 1353 (W.D. Mo. 1994) ("Existence of a business relationship does not give rise to a fiduciary relationship, nor a presumption of such a relationship.)

Graham Construction Services, Inc. v. Hammer & Steel, Inc., 2012 WL 68549 (E.D. Mo., March 2, 2012) is instructive. The court in *Graham* granted a motion to dismiss a constructive fraud claim because plaintiff failed to adequately allege that there was the necessary fiduciary relationship to support such a claim. *Id*. at *4. Recognizing that a fiduciary relationship does not exist in Missouri simply because the parties have a business relationship, the Court found that plaintiff's allegations failed to show that plaintiff was subservient to defendant and that the parties' business relationship was anything "other than entirely arms-length." *Id*. at *4-5.

So it is here. Prime Aid has failed to plead any facts establishing that it had a fiduciary relationship with Express Scripts. Accordingly, Count VII should be dismissed.

CONCLUSION

For these reasons, Express Scripts respectfully requests that the Court dismiss the Complaint pursuant to Rule 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of September, 2016 a copy of the foregoing document was filed with the Clerk of the Court to be served upon counsel of record via the Court's ECF system.

/s/ Sarah C. Hellmann